IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-31932

MEDEX REGIONAL LABORATORIES, LLC

Debtor

CHARLES McRAE SHARPE,
CHAPTER 11 TRUSTEE

Plaintiff

v. Adv. Proc. No. 03-3208

PERSHING, YOAKLEY & ASSOCIATES, P.C.

Defendant

MEMORANDUM ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S MOTION TO QUASH SUBPOENA

APPEARANCES: HODGES, DOUGHTY & CARSON, PLLC
Dean B. Farmer, Esq.
Keith L. Edmiston, Esq.
Post Office Box 869
Knoxville, Tennessee 37901-0869
Attorneys for Plaintiff

WAGNER, MYERS & SANGER, P.C.
Martin B. Bailey, Esq.
Post Office Box 1308
Knoxville, Tennessee 37901
Attorneys for Defendant

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The following matters are presently before the court: (1) Plaintiff's Motion to Quash Subpoena (Motion to Quash) filed on May 3, 2004; and (2) Motion by Plaintiff for Protective Order (Motion for Protective Order) filed on May 4, 2004.[1] The Motion to Quash seeks relief from a subpoena duces tecum issued by the Defendant on April 26, 2004, and served on the Debtor's attorneys, seeking to compel the production of documents in their possession on May 14, 2004. The Motion for Protective Order seeks relief from the subpoena duces tecum and from the deposition of the Debtor's designated representative noticed by the Defendant for May 6, 2004.[2] The Defendant's Opposition to Motion to Quash Subpoena and Response to Motion for Protective Order (Opposition) was filed on May 7, 2004. Oral argument was heard on May 20, 2004.

I

The Complaint initiating this adversary proceeding, filed on December 23, 2003, seeks damages for the Defendant's alleged breach of contract stemming from an employment engagement contract whereby the Defendant recruited and recommended for employment the Debtor's former Chief Financial Officer, Mike Ladd. On April 21, 2004, the Debtor filed a Motion by Plaintiff to Amend Complaint, and pursuant to Rule 7015-1 of the Local Rules of the United States Bankruptcy Court for the Eastern District of Tennessee, attached a copy

[1] The Complaint commencing this adversary proceeding was filed by the Debtor. After a hearing held May 20, 2004, an Order was entered on May 21, 2004, providing, *inter alia*, for the substitution of Charles McRae Sharpe, Chapter 11 Trustee, as the party plaintiff. All motions referred to in this Memorandum as having been filed by the Plaintiff were filed by the Debtor prior to the substitution of the Chapter 11 Trustee as Plaintiff.

[2] The dates by which the documents were to be produced and the deposition was to be held have been suspended pending resolution of the Motion to Quash and Motion for Protective Order.

of the proposed Amended Complaint, alleging that the Defendant's breach of contract was a proximate cause of the Debtor's bankruptcy filing and requesting additional damages therefor.[3] Based upon the new allegations and damages sought in the Amended Complaint, the Defendant served a subpoena duces tecum (Subpoena) on Hodges, Doughty & Carson (HDC), attorneys for the Debtor, on April 26, 2004, requiring production of the following documents:

> All documents in the possession, custody, or control of Hodges, Doughty & Carson generated or received or maintained during the course of the representation of MEDex Regional Laboratories, LLC ("MEDex") in Case No. 03-31932, pending before the Bankruptcy Court for the Eastern District of Tennessee. This includes, but is not limited to, all memoranda to the file, voice mails from MEDex, and notes of conversations with any representative of MEDex.

In addition to the Subpoena, the Defendant also served a Deposition Notice of Plaintiff (Notice) on April 28, 2004, noticing the Plaintiff of its intent to take the deposition of the Debtor, pursuant to Federal Rule of Civil Procedure 30(b)(6).[4] The Notice scheduled the deposition for May 6, 2004, and stated that the examination would contain questions, among

---

[3] The Motion by Plaintiff to Amend Complaint was granted in open court on May 20, 2004. Pursuant to an Order entered on May 21, 2004, the Plaintiff is to file the Amended Complaint by May 27, 2004, and the Defendant is to file a responsive pleading by June 4, 2004.

[4] > A party may in the party's notice and in a subpoena name as the deponent a . . . corporation . . . and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

FED. R. CIV. P. 30(b)(6). Rule 30 is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7030.

others, regarding "[a]ll advice given to MEDex by its counsel prior to filing bankruptcy and all facts conveyed to MEDex counsel as the reasons for filing bankruptcy."

In response to the Subpoena, the Debtor filed the Motion to Quash, asserting that the files of its attorneys were not discoverable under the attorney-client privilege. Additionally, the Debtor argues that the Subpoena is overly broad. Thereafter, the Debtor filed the Motion for Protective Order, asserting that the information to be sought at the deposition regarding the advice of its attorneys was privileged information and asked the court to issue a protective order prohibiting the Defendant from proceeding with that line of questioning. Additionally, the Debtor reiterated its position regarding the Subpoena served on HDC.

The Defendant opposes both Motions, arguing that the majority of the documents contained in HDC's files would not be cloaked with attorney-client privilege, as they were also sent to third parties, including the Debtor's parent company, Wellmont Health Systems (Wellmont). Additionally, the Defendant avers that even documents that might otherwise be privileged should be produced because the Debtor waived the attorney-client privilege by putting its attorneys' advice at issue when amending the Complaint to add the Defendant's alleged responsibility for the Debtor's bankruptcy filing as an additional count. Moreover, the Defendant contends that the Debtor selectively disclosed information, waiving the attorney-client privilege as to the whole. Finally, the Defendant avers that the Debtor has simply made a "blanket" assertion of the privilege, which does not meet the heavy burden of proving that it exists.

On May 10, 2004, the Debtor filed a Plaintiff's Reply Memorandum in Support of Motion to Quash and Motion for Protective Order (Reply Memorandum), in response to the issues raised by the Defendant in its Opposition. The Debtor argues that it did not place its confidential communications with its attorneys at issue when it filed the Amended Complaint, and accordingly, it did not waive the attorney-client privilege. Furthermore, the Debtor argues that it did not selectively disclose privileged information. Finally, the Debtor argues that the attorney-client privilege was not waived simply because Wellmont was involved, since the privilege extends along corporation structures and between parent and subsidiary companies.

II

The Subpoena and the Motion to Quash are governed by Federal Rule of Civil Procedure 45, which, as material to the two Motions presently before the court, provides:

> (c) Protection of Persons Subject to Subpoenas.
>
> . . . .
>
> (3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
>
> . . . .
>
> (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
>
> (iv) subjects a person to undue burden.
>
> . . . .

(d) Duties in Responding to Subpoena.

. . . .

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

FED. R. CIV. P. 45. Rule 45 "applies in all cases under the [Bankruptcy] Code." FED. R. BANKR. P. 9016.

The Debtor's Motion for Protective Order was filed pursuant to Federal Rule of Civil Procedure 26, which governs all general discovery issues, and provides in material part:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. . . .

. . . .

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort

> to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> > (1) that the disclosure or discovery not be had; [and]
> >
> > . . . .
> >
> > (4) that certain matters not be inquired into, or that the scope of disclosure or discovery be limited to certain matters[.]
> >
> > . . . .
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery.

FED. R. CIV. P. 26 (made applicable to bankruptcy proceedings by virtue of FED. R. BANKR. P. 7026).

The Debtor first argues that it should not be required to comply with either the Subpoena or the Notice based upon attorney-client privilege. "The attorney-client privilege 'only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.'" *In re Fed. Copper of Tenn., Inc.*, 19 B.R. 177, 181 (Bankr. M.D. Tenn. 1982) (quoting *Upjohn Co. v. United States*, 101 S. Ct. 677, 685 (1981)). "Because it is an 'obstacle to the investigation of the truth,' the privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *Deutscher v. Lick Fork, Ltd. (In re S. Indus. Banking Corp.)*, 35 B.R. 643, 647 (Bankr. E.D. Tenn. 1983) (quoting *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976)). The privilege

may be applied to corporations, organizations, and individuals. *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1999). Claims of attorney-client privilege should be construed narrowly since it "reduces the amount of information discoverable during the course of a lawsuit[, and it] applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.)*, 293 F.3d 289, 294 (6th Cir. 2002) (citations omitted).

Pursuant to Federal Rule of Evidence 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, [or] person . . . shall be determined in accordance with State law." FED. R. EVID. 501. Accordingly, because all issues presented in this adversary proceeding shall be determined under Tennessee law, whether the attorney-client privilege applies is also a matter of Tennessee law. The Tennessee General Assembly has codified the attorney-client privilege as follows:

> Privileged communications.—No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

TENN. CODE ANN. § 23-3-105 (1994). "[T]he purpose of the privilege is to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest

of protecting a relationship that is a mainstay of our system of justice." *Bryan v. State*, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992).[5]

The attorney-client privilege is not, however, without limits. It applies only to communications between a client and attorney involving the subject matter of the representation that were intended to remain confidential. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002); *Bryan*, 848 S.W.2d at 80.

> [The privilege] excludes all communications, and all facts that come to the attorney in the confidence of the relationship. But there are many transactions between attorney and client, that have no element of confidence in them, of which he is competent to testify. For instance, he may prove his client's handwriting; may prove what money was collected by him, when paid over, and to whom paid.

Humphreys, Hutcheson & Moseley v. Donovan, 568 F. Supp. 161, 175 (M.D. Tenn. 1983) (quoting *Johnson v. Patterson*, 81 Tenn. 626, 649 (Tenn. 1884)). Accordingly,

> the privilege does not extend to communications from an attorney to a client when they contain advice solely based upon public information rather than confidential information. Similarly, if the advice rendered by the attorney was clearly not intended to relate to client confidentiality, such as advice respecting a trial date or the client's presence at trial, the privilege would not apply. Likewise, advice given on general questions of law, when no facts are or need be disclosed or inferred which would implicate the client, would not ordinarily be covered by the privilege.

---

[5] Tennessee law governing attorney-client privilege is consistent with that of the Sixth Circuit, which defines attorney-client privilege in the context of federal common law in federal question cases, as follows:

> The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir. 1999).

Bryan, 848 S.W.2d at 80 (citations omitted). "Information learned from other sources is not privileged." *S. Indus. Banking Corp.*, 35 B.R. at 647. Additionally, the privilege is lost if the confidential information is communicated in the presence of parties not bound by the privilege or is voluntarily divulged or disclosed to third parties. *Boyd,* 88 S.W.3d at 213.

The party seeking to invoke the privilege through a protective order bears the burden of proving "that the communications [to be protected] were made in the confidence of the attorney-client relationship." *Bryan*, 848 S.W.2d at 80; *see also Fed. Copper of Tenn., Inc.*, 19 B.R. at 181. Therefore, "[q]uestions pertaining to the validity of an asserted attorney-client privilege must be resolved on a case-by-case basis." *S. Indus. Banking Corp.*, 35 B.R. at 648. "[T]he moving party must demonstrate specific examples of harm and not mere conclusory allegations." *Loveall v. Am. Honda Motor Co., Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985). This requires the moving party to establish the existence of the privilege by expressly disclosing the contested documents and describing their content, with sufficient detail, so that the court may make its determination as to whether the privilege applies. *Fleet Bus. Credit Corp. v. Hill City Oil Co., Inc.*, No. 01-02417-MAV, 2002 U.S. Dist. LEXIS 23896, at *7 (W.D. Tenn. Dec. 5, 2002) (citing FED. R. CIV. P. 26(b)(5) and TENN. R. CIV. P. 26.02(5)); *see also United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990) ("[C]laims of attorney-client privilege must be asserted document by document, rather than as a single, blanket assertion.").

> To ensure the proper invocation of the attorney-client privilege, the court will order . . . the preparation of [an] index. This index should reveal the source of the information, whether the communication occurred in confidence, and whether the source was a lawyer working as an attorney for the [Debtor]. . . . [The] attorney-client relation alone is insufficient to envelop documents under

> the attorney-client umbrella. "It must also be demonstrated that the information is confidential." . . . [This type of] index, which the [Debtor] must file, incorporates this requirement. The [Debtor], within the index, must identify the source of the communication and whether it emanated with an understanding of confidentiality.

United States v. Exxon Corp., 87 F.R.D. 624, 637-38 (D.D.C. 1980) (quoting *Mead Data Cent., Inc. v. United States Dept. of Air Force*, 566 F.2d 242, 253 (D.C. Cir.1977)).

The Debtor has not provided the court with anything more than a "blanket" assertion of the attorney-client privilege, and without more, the court cannot make a determination if the privilege exists or not. Clearly, however, not all documents and communications contained in HDC's files are cloaked with the privilege. For example, documents or communications that do not pertain to confidential information are not covered, including cover letters or facsimile cover sheets. *See Fleet Bus. Credit Corp.*, 2002 U.S. Dist. LEXIS 23896, at *15. Additionally, documents and communications to and from third parties are not privileged. This includes documents and communications with Wellmont and its attorneys. While Wellmont now has 100% ownership of the Debtor, at the time of the bankruptcy filing and at the time that the events forming the basis of this lawsuit occurred, Wellmont was only a 50% owner of the Debtor. Moreover, the Debtor has gone to great lengths to argue, in other matters before this court, that it and Wellmont are two separate and distinct companies, with differing but compatible interests. Wellmont may now be the parent company of the Debtor; however, the nature of the relationship now does not retroactively transform all previous communications into privileged ones.

If the Debtor seeks to invoke attorney-client privilege on specific communications contained in HDC's files, it must provide the court with a detailed index of the challenged documents. "This index [must] reveal the source of the information, whether the communication occurred in confidence, and whether the source was a lawyer working as an attorney for the [Debtor]." *Exxon Corp.*, 87 F.R.D. at 637. Additionally, the index must identify the document, disclose its date, reveal the intended recipient of the document, each individual who received a copy, and the purpose for which the document was prepared. Furthermore, the index must be thorough and specific enough for the court to make a determination if the document or communication contains privileged information. Likewise, if there is information or evidence regarding specific legal advice that the Defendant seeks at the Debtor's Rule 30 deposition, the Debtor's representative must make a specific assertion of the privilege as to each individual question that is asked, and the representative must provide to the court enough detailed information regarding the substance of the alleged privileged communication to allow the court to make an educated determination whether the privilege applies.

Additionally, and along those lines, the court believes that the Defendant must be more specific about the documents and information it seeks in the Subpoena. Its request for "all" documents and communications contained in HDC's files concerning the Debtor's bankruptcy case is overly broad. *See, e.g., Pollard v. E.I. DuPont de Nemours & Co.*, No. 95-3010-MIV, 2004 U.S. Dist. LEXIS 6345, at *13 (W.D. Tenn. Feb. 24, 2004). If the Defendant seeks particular information, documents, or communications, it must state, with

more specificity, what it seeks. The court will not allow the Defendant to peruse the Debtor's entire bankruptcy file on a fishing expedition. The Defendant must set forth a specific time period and provide the Debtor with something more concrete regarding the information sought. Additionally, the Defendant must make its specific requests prior to the Debtor's required index setting forth any asserted privileged materials.[6]

III

In summary, the Defendant's Subpoena is overly broad. The Defendant must provide the Debtor with a more specific request for the production of documents contained in the files of HDC, including a time-line under which it seeks documentation. Once the Debtor has received the Defendant's revised subpoena requiring the production of documents, the Debtor may assert attorney-client privilege as to specific documents, communications, or information contained within HDC's files; however, it must provide the court and the Defendant with a detailed index setting forth the individual documents that it claims are privileged, along with the information heretofore described by the court. Likewise, if the Debtor desires to invoke attorney-client privilege at its Rule 30 deposition, it must do so in response to specific questions, again setting forth, in detail, the above requirements and the basis for its privilege assertions. Only then may the court make a determination if the privilege applies.

[6] The Defendant argues that the Debtor waived its attorney-client privilege; however, the court will not address those arguments at this time. Instead, the Debtor must be given the opportunity to present its specific assertions of attorney-client privilege as set forth in this Memorandum. At that time, if the Defendant wishes to reassert its waiver arguments, the court will address them accordingly.

For the reasons set forth herein, the Plaintiff's Motion to Quash will be granted because the April 26, 2004 subpoena duces tecum served by the Defendant on HDC is overly broad. The Defendant may, however, obtain the issuance of another subpoena duces tecum more narrowly identifying the documents it desires HDC to produce. The Plaintiff's Motion for Protective Order will be denied.

An order consistent with this Memorandum will be entered.

FILED: May 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-31932

MEDEX REGIONAL LABORATORIES, LLC

Debtor

CHARLES McRAE SHARPE,
CHAPTER 11 TRUSTEE

Plaintiff

v. Adv. Proc. No. 03-3208

PERSHING, YOAKLEY & ASSOCIATES, P.C.

Defendant

O R D E R

For the reasons stated in the Memorandum on Plaintiff's Motion for Protective Order and Plaintiff's Motion to Quash Subpoena filed this date, the court directs the following:

1. The Plaintiff's Motion for Protective Order filed by the predecessor Plaintiff MedEx Regional Laboratories, LLC, on May 4, 2004, is DENIED.

2. The Plaintiff's Motion to Quash Subpoena filed by the predecessor Plaintiff MedEx Regional Laboratories, LLC, on May 3, 2004, is GRANTED. The April 26, 2004 subpoena duces tecum served by the Defendant on the law firm of Hodges, Doughty & Carson is overly broad and is QUASHED, without prejudice to the Defendant's right to have another subpoena

duces tecum issued and served on Hodges, Doughty & Carson more specifically identifying the documents to be produced.

3. To the extent the attorney-client privilege may be asserted by MedEx Regional Laboratories, LLC, in future discovery associated with this adversary proceeding, the guidelines set forth by the court in the accompanying Memorandum on Plaintiff's Motion for Protective Order and Plaintiff's Motion to Quash Subpoena shall be observed.

SO ORDERED.

ENTER: May 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE